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No. 82-889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OVERHEAD DOOR COMPANY OF METROPOLITAN WASHINGTON,
Petitioner,

v.

WASHINGTON AREA CARPENTERS' WELFARE FUND, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether, absent a showing that the union represents a majority of the employer's employees in the appropriate bargaining unit, a prehire agreement authorized by Section 8(f) of the National Labor Relations Act is enforceable in a suit brought by employee benefit plans against an employer in the construction industry, until such time as a party to the agreement manifests its intent to void the agreement.

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Respondents, Washington Area Carpenters' Welfare Fund, Washington Area Carpenters' Pension and Retirement Trust Fund, Washington Area Carpenters' Apprenticeship Plan, and Washingon Area Carpenters' Trust Funds (herein together "Respondent Funds") pray that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit; in the alternative, Respondent Funds submit that the writ of certiorari should only issue with respect to the narrower question identified by them.

STATEMENT OF THE CASE

The issue presented in this case—whether a prehire agreement is enforceable by employee benefit plans absent a showing that the union signatory to the relevant collective bargaining agreement is the majority representa-

tive of the employer's employees prior to the manifestation by any party of its intent to void and repudiate the agreement—as Petitioner asserts, is virtually identical to the issue which this Court has agreed to review in *Jim McNeff, Inc.* v. *Todd, cert. granted,* 102 S.Ct. 3508 (1982) (No. 81-2150) ("McNeff"). The facts also are similar.

Petitioner Overhead Door Company of Metropolitan Washington (Petitioner Overhead Door), an employer in the construction industry, executed a collective bargaining agreement with the Carpenters District Council of Washington, D.C. (Carpenters Union), a labor organization, in 1969. Thereafter, Petitioner Overhead Door entered into successive collective bargaining agreements in 1972 and 1976. The litigants[1] all agree that each agreement was a "prehire" agreement as that term is commonly known in the construction industry, authorized by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f).

Each of the agreements between the Carpenters Union and Petitioner Overhead Door require that contributions be made to Respondent Funds. Prior to January 9, 1979, the date the Respondent Funds commenced this action, the Petitioner Overhead Door neither manifested its intent to void nor repudiate the agreement. *See Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.,* 681 F.2d 1, 10, fn. 38 (D.C. Cir. 1982).

On April 22, 1980, the District Court granted summary judgment for Petitioner Overhead Door. *See Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.,* 488 F. Supp. 418, *rev'd* 681 F.2d 1 (D.C. Cir. 1982). On June 15, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's entry of summary judgment, ruling that prehire agreements were enforceable in a breach of contract action until the date when either party manifests its intent to void the agreement. *See Washington Area Carpenters'*

[1] The Carpenters Union has never been a party to this litigation.

Welfare Fund v. *Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982).

ARGUMENT

The decision of the Court of Appeals of which review is sought in this case follows the decisions rendered by the Eighth, Ninth and Tenth Circuits' holding that employee benefit plans may recover unpaid contributions due under a prehire agreement until such time as the contract is voided.[2] Only the Fifth Circuit has held to the contrary, and, their conflict with other circuits has been recognized. *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, No. 81-3222 (5th Cir. decided Nov. 4, 1982). Consequently, as to the issue of enforcing a prehire agreement absent proof of majority representation of the relevant employees in the appropriate unit until such time as a party to the agreement manifests its intent to void the agreement, substantial agreement does exist among the Circuit Courts. Since a prevailing standard has been established, the need to review this question is less compelling.

Moreover, at issue in this case is the very limited question of whether employee benefit plans in the construction industry as third party beneficiaries of prehire agreements may enforce contributions required under Section 8(f) agreements, absent a showing that the union represents a majority of the employer's employees in the appropriate bargaining unit, until a party to the agreement repudiates the agreement. The question suggested by

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[2] The Tenth Circuit has further held that, as a matter of contract interpretation, prehire agreements may be retrospectively and prospectively enforceable. *New Mexico District Council of Carpenters* v. *Mayhew Co.*, 664 F.2d 215, 219-20 (10th Cir. 1981) As the United States Court of Appeals for the District of Columbia Circuit indicated, the *Mayhew* court suggested, but did not hold, that as a matter of labor law prehire agreements are both prospectively and retroactively enforceable. *See Washington Area Carpenters' Welfare Fund*, 681 F.2d at 9.

Petitioner Overhead Door goes beyond the narrow ruling of the Court of Appeals.

Petitioner Overhead Door's question raises issues not argued below including whether the agreement is enforceable prospectively and what particular conduct is necessary to repudiate the agreement. Consequently, a writ of certiorari, if granted, should be limited to the issue actually ruled upon by the Circuit Court below.

CONCLUSION

For the foregoing reasons, Respondent Funds move that this Court deny the Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, or, in the alternative, issue such Writ only with respect to the more limited question set forth herein.

Respectfully submitted,

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